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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARIA DELGADO,

Plaintiff and Appellant,

v.

ESTRELLA 97 CENTS AND UP STORE
et al.,

Defendants and Respondents.

B171909

(Los Angeles County Super. Ct.
No. VC037724)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Peter Espinoza, Judge. Reversed.

Law Offices of Michels & Watkins, Steven G. Stevens and Narbeh Bagdasarian
for Plaintiff and Appellant.

No appearance for Defendant and Respondent Estrella 97 Cents and Up Store.

Friedenthal, Cox & Herskovitz, Scott A. Cox, Mark H. Herskovitz and Janette S.
Bodenstein for Defendant and Respondent Sheng Hsiang Jen (USA), Inc.

Plaintiff and appellant Maria Delgado appeals from a judgment of dismissal following the sustaining of a demurrer in favor of defendant and respondent Estrella 97 Cents and Up Store¹ and the granting of a motion to strike in favor of defendant and respondent Sheng Hsiang Jen (USA), Inc. (SHJUSA) in this action for damages arising out of the distribution of a defective product. The trial court sustained Estrella's demurrer without leave to amend on the ground that the cause of action for negligent infliction of emotional distress was barred by the statute of limitations. Delgado filed an amended complaint. SHJUSA and defendant New Choice Food, Inc. filed motions to strike the cause of action for negligent infliction of emotional distress, based on the trial court's ruling sustaining the demurrer without leave to amend. The trial court granted the motions to strike without leave to amend and entered a judgment of dismissal as to all defendants.² Delgado contends: (1) it is not clear from the face of the complaint that the cause of action for negligent infliction of emotional distress is barred by the statute of limitations; and (2) the trial court abused its discretion in denying leave to amend. We reverse.

FACTS AND PROCEDURAL BACKGROUND

On July 31, 2002, Delgado, individually and as guardian ad litem for her daughter Jasmin Beltran, filed an action against several defendants, including SHJUSA, New Choice, and Estrella. On behalf of Beltran, the complaint alleged causes of action for

¹ In July 2002, Estrella requested an extension of time to file a respondent's brief, based on a pending settlement with Delgado. Ultimately, Estrella did not file a respondent's brief and is not an active party on appeal, but Delgado has not dismissed her appeal as to Estrella.

² Delgado appealed from the judgment of dismissal as to all defendants. Based on a settlement with New Choice, Delgado dismissed her appeal as to New Choice and New Choice is not a party on appeal. The sole responding party on appeal is SHJUSA.

negligence, products liability, failure to warn, breach of warranty, fraudulent concealment, and civil conspiracy. The sole cause of action Delgado alleged on her own behalf against defendants was negligent infliction of emotional distress.

The complaint alleged as follows. SHJUSA and New Choice are companies within the chain of distribution of a candy called “Fruit Gel Cup Candies” or “Gel Candies.” Estrella sold the candy to the public. The candy contains an ingredient that presents a serious choking hazard. On December 7, 2000, Beltran “ingested defendants’ gel candy which caused her to choke.” The lack of oxygen to Beltran’s brain caused serious, permanent damage. Delgado saw her daughter choking and suffered severe emotional distress as a result of witnessing her daughter’s injury.

Estrella filed a demurrer on several grounds, including that Delgado’s cause of action for negligent infliction of emotional distress was barred by the one-year statute of limitations. Delgado opposed the demurrer. She argued that under the delayed discovery rule, the cause of action did not accrue until she was aware of both her injury and its negligent cause. Because the complaint did not state the date that Delgado realized the negligent cause of the injury to her daughter, she asserted that it was not clear from the face of the complaint that it was barred. Delgado requested leave to amend in the event that the trial court sustained the demurrer. Estrella filed a reply and argued that the delayed discovery rule did not apply because it was clear from the face of the complaint that Delgado was aware the candy was the cause of the injury on the date of the injury.

A hearing was held on October 30, 2002. Delgado requested leave to amend in order to allege that she had observed her daughter choking on the candy, but was not aware of the negligence issue concerning this particular type of candy until April or May 2002, at which time she learned that the candy had caused several deaths and been recalled by the manufacturers and the Food and Drug Administration (FDA). The trial court found that the delayed discovery rule did not apply, because the complaint was based on injuries that resulted from Beltran choking on the candy, which Delgado witnessed, and she had a suspicion of wrongdoing at the time of the injury. The trial

court sustained the demurrer as to Delgado's cause of action for negligent infliction of emotional distress without leave to amend.³

On November 18, 2002, Delgado filed an amended complaint that included a cause of action for negligent infliction of emotional distress against all defendants. The amended complaint additionally alleged that the candy had caused choking deaths and had been recalled in several foreign countries, including Japan, prior to distribution in the United States. Delgado observed her daughter choking on the candy on December 7, 2000. However, she discovered defendants' negligent formulation, design, packaging, manufacture, import and export, sale, distribution, advertising, and marketing of the candy in 2002. As a result of observing her daughter's injury and discovering defendants' negligence, Delgado suffered severe emotional distress.

In December 2002, New Choice and SHJUSA each filed a motion to strike the cause of action for negligent infliction of emotional distress, based on the trial court's ruling sustaining Estrella's demurrer without leave to amend. Delgado opposed the motions to strike on the ground that the ruling on the demurrer applied solely to Estrella, and the allegations of the amended complaint were sufficient to state a cause of action for negligent infliction of emotional distress against the remaining defendants under the delayed discovery rule. Delgado also stated that she had filed the amended complaint and opposed the motions to strike out of an abundance of caution in order to preserve her right to appeal. The trial court granted New Choice's motion to strike the cause of action for negligent infliction of emotional distress from the amended complaint without leave to amend on the grounds that Estrella's demurrer to that cause of action had been sustained without leave to amend and the delayed discovery rule did not apply.

³ Delgado filed a petition for writ of mandate based on the trial court's ruling sustaining the demurrer without leave to amend. This court summarily denied the petition.

On September 16, 2003, the trial court entered a judgment dismissing Delgado's claims as to all defendants, based on the rulings sustaining the demurrer and granting the motions to strike without leave to amend. Delgado filed a timely notice of appeal from the September 16, 2003 judgment. The notice of appeal incorrectly identified the parties in the body of the notice, and on January 7, 2004, this court ordered the notice of appeal deemed corrected to reflect Delgado as the appellant and Estrella, New Choice, and SHJUSA as respondents.

DISCUSSION

Standard of Review

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Delayed Discovery of the Negligent Cause of Injury

Delgado contends the allegations of the complaint did not necessarily show that her cause of action for negligent infliction of emotional distress was barred by the statute of limitations. We conclude that Delgado failed to include the necessary factual allegations to show delayed discovery. However, Delgado has demonstrated a reasonable possibility that she can amend the complaint to allege delayed discovery.

By relying on the discovery rule, Delgado concedes that her claim would otherwise be barred by the one-year statute of limitations provided by former Code of Civil Procedure section 340, subdivision (3). The common law rule that a personal injury action accrues on the date of injury is modified by the discovery rule. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.) “The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause.” (*Ibid.*) “Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.” (*Id.* at p. 1110.) The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. (*Id.* at pp. 1110-1111.) “A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” (*Id.* at p. 1111.)

“A plaintiff whose complaint shows on its face that [her] claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.” (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160.)

In Delgado's original complaint, she failed to allege the time and manner of her discovery of the negligent cause of the injuries. She also failed to allege facts showing that she was unable to have discovered the negligent cause of her injury earlier, despite reasonable diligence. None of the allegations of the original complaint even suggest Delgado was unaware of the negligent cause of her injury at the time of the injury. Based on the allegations of the complaint, the demurrer was properly sustained.

However, Delgado contends she should have been permitted an opportunity to amend her complaint to allege delayed discovery of the negligent cause of her injury. She has offered that she could allege the following additional facts. Beltran was approximately two and a half years old when she ate the candy on December 7, 2000. Although Delgado experienced emotional distress when she witnessed her daughter choking on the candy, she did not suspect there was anything defective about the candy that caused her daughter to choke. In April 2002, Delgado learned for the first time that a dangerous ingredient made the candy unsafe for children's consumption.

Where the apparent natural cause of an injury "lacks any connotation of the intervention of any immediate outside cause," the plaintiff's "blameless ignorance" tolls the statute of limitations. (*Frederick v. Calbio Pharmaceuticals* (1979) 89 Cal.App.3d 49, 58-59 [decedent received massive doses of experimental drug for three months and died of coronary thrombosis four days after final consumption; court found plaintiffs could allege delayed discovery, because coronary thrombosis is leading cause of natural death and plaintiffs had no reason to suspect relationship between administration of the drug and death until FDA press release, more than one year later, announced recall of drug].)

"Where, as here, the injury is obvious but there is nothing to connect that injury to defendant's negligence it cannot be said as a matter of law the plaintiff's failure to make an earlier discovery of fault was unreasonable." (*Unjian v. Berman* (1989) 208 Cal.App.3d 881, 885 [court found triable issue of fact as to delayed discovery even though plaintiff patient rescinded arbitration agreement less than one month after face-lift

surgery because he looked worse, on the grounds that an operation's failure to produce expected result would not necessarily suggest to the ordinary person that operation had been performed negligently and a trier of fact could reasonably conclude plaintiff was justified in accepting doctor's explanations while under doctor's care]; cf. *Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 779-781 [court found as a matter of law plaintiff should have suspected breast implant product was defective no later than December 1984 and could not rely on belief that complications were caused by her body's rejection of the implants to toll the statute of limitations beyond that date, where plaintiff patient underwent breast implant surgery in 1983, experienced pain and complications despite multiple corrective surgeries, left her doctor's care, consulted with three breast implant experts who unequivocally recommended removal of the implants, and had the implants removed in December 1984, one of which was noted to have been broken preoperatively].)

In this case, a trier of fact could reasonably conclude that on the date Delgado witnessed her daughter choking, Delgado had no reason to suspect her injury was caused by any wrongdoing. Parents are frequently cautioned by childcare professionals that candy, hot dog pieces, grapes, and other similar foods are dangerous for young children to eat because they pose a choking hazard. The foods are not inherently defective; rather, it is the young child's immature ability to chew and swallow that causes the child to choke on these types of foods. When a toddler chokes on a piece of food, the logical assumption is that the toddler did not chew and swallow the food properly. A parent does not usually suspect wrongdoing in the manufacture and distribution of the food such that the food itself caused the child to choke. In the instant case, Delgado should be given an opportunity to amend her complaint to allege delayed discovery, including clarification that: (1) at the time of her daughter's injury, she believed her daughter's failure to properly chew and swallow the candy had caused her to choke; (2) Delgado had no reason to suspect any wrongdoing until April 2002, when she learned the particular type of candy eaten by her daughter had been recalled because it contained an ingredient that

caused children to choke and made it defective for children's consumption; and (3) she could not have discovered the source of the injury earlier through reasonable diligence.

Waiver

SHJUSA contends that Delgado's appeal is moot because she has settled her action with the other defendants. Alternatively, SHJUSA contends Delgado waived the issue of delayed discovery because she opposed SHJUSA's motion to strike only on the ground that the ruling on the demurrer did not apply to SHJUSA. These contentions are incorrect.

We note that Delgado has not dismissed her appeal against Estrella and no evidence has been submitted to this court that Delgado settled her action with Estrella. However, regardless of whether Delgado settled her action with Estrella, her appeal from the judgment of dismissal as to SHJUSA is not moot, nor have the issues been waived. The judgment of dismissal as to SHJUSA was based on the trial court's rulings sustaining Estrella's demurrer and granting the motions to strike. SHJUSA's motion to strike was based solely on the ground that the trial court had previously sustained Estrella's demurrer to the negligent infliction of emotional distress cause of action without leave to amend. In other words, SHJUSA argued that the ruling on the demurrer applied to SHJUSA as well. In ruling on the motions to strike, the trial court explicitly rejected Delgado's discovery rule argument for a second time. The statute of limitations issue was presented to the trial court as to all defendants and not waived on appeal. Moreover, even if Delgado had not made a sufficient offer of proof in the trial court, she could demonstrate a reasonable possibility of amendment on appeal.

DISPOSITION

The judgment of dismissal is reversed. The trial court's orders sustaining the demurrer without leave to amend and granting the motions to strike without leave to amend are reversed as to the cause of action for negligent infliction of emotional distress. The trial court is directed to enter new and different orders sustaining the demurrer and granting the motions to strike as to the cause of action for negligent infliction of emotional distress with leave to amend. Appellant Maria Delgado is awarded her costs on appeal.

NOT TO BE PUBLISHED.

KRIEGLER, J.*

We concur:

TURNER, P. J.

ARMSTRONG, J.

* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.